DEC 4

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 124

NORVEL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

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Mindful of the applicable rule, we shall confine attention solely to certain erroneous and misleading statements in respondent's brief. The studied effort to convey the impression by quoting carefully selected excerpts from the evidence and the court's charge that "only one issue was tried" needs especially to be exposed.

Respondent's present attempt to make it appear that the sole issue tried was whether a crack existed in the tender is unworthy. In pleading, in proof, and in the court's charge this case was tried on the theory that defendant might be liable if its negligence or if its violation of the Safety Appliance Act in *either* of the respects alleged in Paragraphs 4d or 4e of the complaint caused the accident. In submitting the Safety Appliance Act to the jury nowhere did the trial court restrict or confine its instruction exclusively to the

existence or non-existence of the crack or leak—in nowise was the jury charged that a finding of a violation of the Safety Appliance Act would have to be predicated solely upon such a defect. The special interrogatory submitted at respondent's request contained no such limitation.

Significantly, respondent in quoting from the court's charge has omitted any reference to the following portions:

1. Wherein the court advised the jury that the action was brought under both the Federal Employers' Liability Act and the Safety Appliance Act, reading the latter verbatim (R. 116, 7).

2. Wherein the court instructed the jury, "You are further instructed that under the law the defendant was bound to furnish to the plaintiff a locomotive, at the time in question, which was safe to be used, and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk" (R. 119).

3. Wherein the court advised the jury that one of the charges in plaintiff's complaint was that defendant required him, "on this occasion to work on the engine tank when this engine tank was unsafe and dangerous because defendant negligently allowed, caused and permitted ice to accumulate and be on the engine tank at the place where it required plaintiff to work; and that thereby, plaintiff was so at work, * * *" (R. 118).

4. Wherein the trial court instructed the jury that assumed risk was not available if defendant violated the Safety Appliance Act and instructed the jury that it would not prevent plaintiff from recovering if under the law and the evidence they found a violation of the Safety Appliance Act as charged in plaintiff's complaint (R. 120).

5. Wherein the court instructed the jury that "in the

event you find the defendant did not violate any Safety Appliance Act, but that you do find under the evidence and instructions of the Court, that defendant was guilty of one of the other charges of negligence alleged in plaintiff's complaint, and further find that plaintiff was guilty of negligence contributing to his injury in this case, then plaintiff's contributory negligence does not bar him from recovering in this action but will affect any damages he is entitled to recover * * *" (R. 120).

6. Wherein the court at the request of respondent instructed the jury:

"The Court instructs the jury that one of the charges of negligence against the defendant was that it negligently permitted ice to be and remain upon the deck of the tender. If you find from all the evidence under the instructions of the Court that the plaintiff was guilty of negligence which contributed to cause his injuries and that the injuries were sustained as a result of the defendant negligently permitting said ice to be and remain upon the deck of the tender and not because of any crack or leak in the tender, and if you further find that the defendant was guilty of negligence which contributed with the negligence of the plaintiff to cause his injuries, then it is your duty to diminish the amount * * *" (R. 124).

7. Wherein the court instructed the jury:

"You are further instructed that if you believe from a preponderance of the evidence, under the instructions of the Court, that the defendant was guilty of negligence and unlawful conduct in any of the charges made in plaintiff's complaint, and that as a direct and proximate result and in consequence thereof plaintiff sustained injuries, as charged by the plaintiff, and that plaintiff did not assume the risk of his employment, then you should find the defendant guilty, provided, however, that if you find, from a preponderance of the evidence and under the instructions of this Court, that the defendant is guilty of a violation of a Safety Appliance Act,

as charged in plaintiff's complaint, then assumption of risk is no defense" (R. 120).

Counsel ask on Page 21 why Paragraph 4 (c) was not more specific if it intended to charge a violation of the Safety Appliance Act. The answer to the query is that Paragraph 4 (d) of the complaint raises the issue as to the effect of ice as a violation of the Safety Appliance Act, and the trial court submitted this issue by instructing the jury that compliance with the law required a tender "which was safe to be used and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk" (R. 119).

I.

The Application of a Controlling Rule of Law Overlooked by an Inferior Court Does Not Involve a Change of Theory.

Petitioner's theory of the trial, in addition to a claim of general negligence, was that the Safety Appliance Act had been violated in two respects. The jury had a perfect right to adopt plaintiff's theory and to find that the Safety Appliance Act had been violated in the respect not involved in the special interrogatory. From the general verdict it is apparent that the jury may have properly so found.

If a case be pleaded and proved under the Safety Appliance Act, then whether the statute be referred to *co nomine* is immaterial. For the purpose of this case Rule 153 of the Interstate Commerce Commission is a part of the statute. The rule is just as binding and controlling on a lower court as a decision of this court construing a Federal statute.

This Honorable Court has laid down the rule that where no express claim was made under an Act of Congress (Federal Employers' Liability Act), but where facts were

expressly alleged and proof clearly established that the injury complained of was governed by the Federal statute, then the Federal Act controls, even though not urged at the trial. *Grank Trunk Western Ry. vs. Lindsay*, 233 U. S. 42, 34 S. Ct. 581.

That it is not necessary to refer to either the Safety Appliance Act or the Employers' Liability Act, or that even though the pleader mistakenly alleges a case under the State Act, this is immaterial and the court is presumed to be cognizant of the Federal statutes and to apply them was held in *Norfolk & W. Ry. Co. vs. Hall*, 49 F. (2d) 692, and *Hines vs. Smith*, 275 F. 766.

See also *Central Vermont Ry. Co. vs. White*, 238 U. S. 507, 35 S. Ct. 865.

We recognize the well-settled rule that a party who has invited error and who has induced the court to commit it cannot later complain. We also recognize the equally elementary rule that a party cannot submit his case on one theory and "ask for a reversal upon another and inconsistent theory," as in *Snyder vs. Snyder*, 142 Ill. 60. Nor do we question the universal proposition that parties who litigate by consent issues not made by the pleadings are bound by the determination (which principle, if applicable at all, militates against respondent here), as in *San Juan Light Company vs. Requena*, 224 U. S. 89, and *M-K-T Ry. Co. vs. Wilhoit*, 160 F. 440. The instant case does not come within either of the above categories; there has been no change or departure, no invited error, no submission of extraneous issues. Petitioner's counsel and the Appellate Court had simply overlooked an applicable rule of law which confirmed, fortified, and required that the result reached by the jury and the trial court be sustained.

It is argued that because petitioner's counsel mistakenly

and foolishly argued to the jury that a negative answer to the special interrogatory would put his client out of court, that petitioner and the court are forever conclusively bound by this expression of opinion. The argument of petitioner's counsel is not reported in full. The portion wherein petitioner's counsel argued liability on other bases has been omitted, but irrespective of this feature of the case, the jury were instructed at respondent's request that they must accept the law from the court's instructions (R. 125), not from the argument of counsel.

II.

The Doctrine of the Ford Case Has No Application Under Rule 153.

The authorities relied upon by the respondent such as the *Reeves*, *Slater*, *Benson*, *Harlan*, and *Riley* cases are distinguishable for two reasons:

First, in such cases there was no claim of liability based on non-compliance with a standard set up by rule of the Interstate Commerce Commission.

Second, the case at bar is not one where the ice resulted "accidentally from some unforeseen cause," but where as found by the trial court it was negligently deposited on the tender nor is it a case where "a brakeman slips upon a running board coated with ice during a sleet storm."

III.

The Weight and Credibility of Testimony Was for the Jury.

The court will receive no help from reckless rhetoric nor from epithets, and the inconsistency of respondent's argument should not be obscured by this strategy. Petitioner, who is made the target of severe strictures in respondent's brief, might well inquire as to whether the conduct of respondent's counsel in quoting on Page 12 of the brief from *Schilling vs. Delaware and H. R. Corporation*, 114 F. (2d) 69, commends itself for candor. The quotation on Page 12 of respondent's brief is calculated only to induce the court to believe that the evidence was insufficient. This impression has been created because petitioner has omitted the last and most vital sentence in the quoted paragraph, which is as follows:

> "Though the evidence was meager, we are not prepared to say, however, that it was not enough to submit this ground of negligence to the jury under proper instructions."

The argument of respondent's counsel is far more contradictory and inconsistent than that made by petitioner's counsel to the jury. On assumed risk, respondent argues that petitioner's testimony as to a crack in the tender should be accepted, and, therefore, he "knew it the day before" and "had ample time to protest and opportunity to do so" and hence did not "have to make a sudden choice." Upon the subject of negligence, respondent then argues that since the jury found there was no crack or leak, it should be held that there was no evidence "as to how long the ice was there and how it happened to be there."

Respondent's argument that petitioner committed perjury was presented to and rejected by the tribunal constitutionally appointed to try the issue. Such argument over-

looks the fact that the verdict was for the petitioner and not for the respondent. It ignores the field of mistake. It misinterprets the issue and improperly extends the operative scope of a civil verdict. Respondent forgets that the *falsus in uno* charge was submitted at its own request (R. 122).

No rule is more thoroughly established in this court than that issues depending on the credibility of witnesses and the effect or weight of evidence are to be decided by the jury, reasonable doubts being resolved in favor of and not against the verdict rendered. *Gunning vs. Cooley*, 281 U. S. 90.

Apparently respondent is under the impression that there is some rule of law to the effect that only its employees who are not injured and who testify for their master are honest, truthful and reliable.

The charge is a false and cowardly one and is tantamount to the *argumentum ad hominem*, which is always a confession of weakness.

Would counsel concede that the general verdict in favor of the petitioner establishes the perjury of all of respondent's witnesses on the other features of the case? If by the answer to the special interrogatory the jury has found that petitioner was wrong with respect to the existence of a crack or a leak, then has not the same tribunal with equal conclusiveness found by the general verdict under the charge of the court that respondent and its witnesses were wrong on the other features submitted to them?

The assertion that the trial almost in its entirety centered about the charge with reference to the crack in the tender is likely to mislead the reader. There was abundant evidence upon both sides with respect to the proper and careful method of filling the tank without overflow and with reference to the impropriety, self-evident anyway, of permitting it to spill on the deck.

The answer to the special interrogatory amounts to nothing more than a finding by the jury that petitioner failed to meet the burden of proof on this question—in other words, that the preponderance of the evidence was with the respondent.

CONCLUSION

It is respectfully submitted that petitioner is entitled to a reinstatement of the original verdict and judgment.

Respectfully submitted,

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